Filed 4/8/09 Larson v. Casual Male Stores CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ASHLEY LARSON, Plaintiff and Appellant, v. CASUAL MALE STORES, LLC, Defendant and Appellant.	D051554, D052185 (Super. Ct. No. GIC 862082)

CONSOLIDATED APPEALS from a judgment and an order of the Superior Court of San Diego County, Jay M. Bloom, Judge. Reversed with directions.

Under Labor Code[1] section 432.8, a California employer may not ask a job applicant about marijuana-related misdemeanor convictions that are more than two years old. The issue in this case is whether job applicants with no marijuana-related convictions have standing to pursue an action for statutory penalties against a business for violating section 432.8 in its job applications. We join Division Three of this court in concluding the answer is no, as such applicants are not within the class of persons the

1 All statutory references are to the Labor Code unless otherwise specified.

legislation is intended to protect, and interpreting the term "the applicant" in section 432.7, subdivision (c), which is incorporated into section 432.8, to include persons not convicted of marijuana-related offenses would lead to an unintended and absurd result. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436 (*Starbucks*).) We reverse a summary judgment awarding $253,800 in statutory penalties to plaintiff Ashley Larson and another 1,268 members of the certified class, and reverse the denial of Casual Male Stores, LLC's (Casual Male) motion for summary judgment. We remand the matter to the trial court for its entry of summary judgment for Casual Male. We also reverse a postjudgment order awarding $107,000 in attorney fees to plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

Casual Male operates numerous retail clothing stores in California. In March 2006 Larson filed a proposed class action against Casual Male for violation of section 432.8. The complaint alleged that in December 2005 Larson applied for employment with Casual Male at a store in El Cajon, California, and the application form asked whether she had any marijuana-related conviction more than two years old. The complaint prayed for a statutory penalty of $500 for each member of the class for Casual Male's intentional violation of section 432.8, or alternatively, a $200 statutory penalty for each member of the class for an unintentional violation of section 432.8, and for costs of suit and reasonable attorney fees. (§§ 432.7, subd. (c), 432.8.)

Page two of the Casual Male employment application Larson completed asked whether she had been convicted of a felony at any time (question 1), or a misdemeanor within the preceding five years (question 2). Immediately below question 2, the

application stated in what was designated as question 3: "If your answer to question 2 above is 'yes,' . . . give the date and details of any misdemeanor for which you were convicted more than [*sic*] five years." Larson answered "no" to questions 1 and 2, and thus she was not called on to disclose any information pertaining to any conviction. At the top of page 1 of the application, the following language appeared: "*If any state or federal law or regulation prohibits the report of any information on this form, the item may be omitted.*" (Original italics.) The application form, however, did not mention California law. It did specifically advise applicants in Connecticut and Washington of certain rights.

In November 2006 the court certified a class consisting of "[a]ll persons who have applied for employment with Defendant CASUAL MALE . . . in the State of California on and after March 2, 2005, and in applying for employment have been asked by Casual Male to disclose on employment applications information regarding misdemeanor convictions for marijuana-related offenses more than two years old." In its order, the court explained "[t]here are approximately 935 applicants who applied for positions of employment with defendant since March 2, 2005," and "[e]ach applicant was provided with one of five employment applications which asked a series of questions seeking information regarding misdemeanor convictions, including misdemeanor convictions for marijuana more than two years old."

Before certification of the class, both sides moved for summary judgment. Larson argued that as matters of law, Casual Male's employment applications violated section 432.8, and she and other class members were each entitled to recover a $500 or $200

penalty, plus costs and reasonable attorney fees. Casual Male argued the complaint should be dismissed because its employment application sought no information regarding marijuana-related convictions, and Larson lacks standing to pursue an action for herself or others because she has no marijuana-related conviction and is thus not included in the class of persons protected by section 432.8.

On January 19, 2007, the court heard oral argument on the motions. On January 26, the court issued an order granting Casual Male's motion as to Larson's individual claims, but denying the motion as to class claims. The court found that Larson lacked standing to pursue her claim because she admitted she had no marijuana-related conviction. The order also states "[t]he ruling on the class is not inconsistent. While applicants may be a proper class, the remedy sought requires a conviction." The court gave the class 30 days to amend to add a representative plaintiff with standing, and gave Casual Male the opportunity to file a motion to decertify the class.

On February 2, however, the court notified the parties it was reconsidering the matter on its own motion. The court asked the parties to file letter briefs on the standing issue, and it continued the hearing to February 23. After the hearing, the court granted Larson's summary judgment motion and denied Casual Male's motion. The court determined Larson and the class members had standing based on the plain meaning of the term "applicant" as used in section 432.7, subdivision (c). The court also found that Casual Male's employment applications violated the law. As to damages, the court noted that class counsel agreed he sought only statutory penalties, and not actual damages for Larson or other class members. The court determined that since plaintiffs had not shown

any intentional violation of the law, each class member was entitled to a statutory penalty of $200, plus costs and reasonable attorney fees.

On June 28, 2007, the court entered judgment for Larson and the class. It identified 1,269 class members from Casual Male's records and assessed statutory penalties of $253,800 against it. In October 2007 the court issued an order awarding plaintiffs $107,000 in attorney fees. Both parties timely appealed the judgment, and Larson also appealed the attorney fees order.

DISCUSSION

I

Standard of Review

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A plaintiff satisfies this burden by " 'prov[ing] each element of the cause of action entitling the party to judgment on that cause of action.' " (*Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, 854.) A defendant satisfies this burden by showing "one or more elements of a cause of action cannot be established because the plaintiff does not possess and cannot reasonably obtain the evidence necessary to establish the claim, or a complete defense to that cause of action exists." (*Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 54.) We independently review the ruling on a motion for summary judgment. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

II

Casual Male's Appeal

A

"Section 432.8 was enacted during the 1970's as part of comprehensive reform legislation which was designed to distinguish minor marijuana offenses from more serious felony drug offenses and to 'minimize or eliminate the lingering social stigma flowing from what's now perceived to be a relatively minor form of criminal activity.' " (*Starbucks, supra,* 168 Cal.App.4th 1436, 1443.) Section 432.7 already prohibited employers from asking job applicants "to disclose, through any written form or verbally," information about arrests that did not result in a conviction. (§ 432.7, subd. (a).)[2] "The marijuana reform legislation extended this prohibition to marijuana convictions that are

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2 Section 432.7, subdivision (a) provides: "No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial."

more than two years old." (*Starbucks, supra,* at p. 1444; § 432.8.)[3]

When an employer violates section 432.8, "the applicant," within the meaning of section 432.7, subdivision (c), may bring an action to recover actual damages or $200, whichever is greater, plus costs and reasonable attorney fees. (§§ 432.7, subd. (c), 432.8.) An intentional violation of the statutes, however, subjects the employer to treble damages or $500, whichever is greater, plus costs and reasonable attorney fees. Further, an intentional violation is a misdemeanor punishable by a $500 fine. (§ 432.7, subd. (c).)

B

Casual Male persists in contending its job applications did not violate the law because it did not ask applicants to disclose protected information in violation of sections 432.7, subdivision (a) and 432.8. Casual Male first asserts that even if a class member had answered "yes" to question 2, regarding any misdemeanor conviction within the preceding five years, it "would not have obtained information regarding a marijuana-related offense." (Underlining omitted.) This assertion is patently meritless. Question 3, though poorly written, clearly required applicants to provide details pertaining to any "yes" answer on question 2, and thus any applicant who answered question 2 affirmatively because of a marijuana-related conviction more than five years old, would

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3 Section 432.8 provides: "The limitations on employers and the penalties provided for in Section 432.7 shall apply to a conviction for violation of subdivision (b) or (c) of Section 11357 of the Health and Safety Code or a statutory predecessor thereof, or subdivision (c) of Section 11360 of the Health and Safety Code, or Section 11364, 11365, or 11550 of the Health and Safety Code as they related to marijuana prior to January 1, 1976, or a statutory predecessor thereof, two years from the date of such a conviction."

have to divulge the details of the crime. Casual Male also submits that question 3 did not violate the law because it did not specifically ask about marijuana-related convictions. Again, however, any applicant who answered question 2 affirmatively would be required to disclose information on any marijuana-related conviction up to five years old. Lastly, Casual Male asserts that since Larson and other class members answered question 2 "no," and thus did not disclose any protected information, the application passed muster. An application, however, should be considered on its face, and not in relation to how particular applicants completed it.

We also reject the notion the applications did not violate sections 432.7, subdivision (a) and 432.8 because of the following language at the top of page one: "*If any state or federal law or regulation prohibits the report of any information on this form, the item may be omitted.*" (Original italics.) This general disclaimer did not mention California law, and was not conspicuous or clear enough to alert an applicant that he or she need not provide any information pertaining to a marijuana-related offense more than two years old.

C

In any event, we agree with Casual Male that Larson lacks standing to pursue this action, on her own behalf or on behalf of the class, because she admittedly suffered no marijuana-related conviction. Further, there has been no showing that any class member has suffered a marijuana-related conviction more than two years old, and thus the designation of a new class representative would not rectify the standing problem.

The standing issue depends on the meaning of statutes, an inquiry that is subject to our independent review. (*Rankin v. Longs Drug Stores California, Inc.* (2009) 169 Cal.App.4th 1246, 1252.) Again, section 432.7, subdivision (c), which is incorporated into section 432.8, provides that "[i]n any case where a person violates this section . . . the applicant may bring an action" to recover actual damages or minimum statutory damages. Larson contends, and the dissent here agrees, that the plain language of section 432.7, subdivision (c) shows it applies to *any* job applicant regardless of whether he or she has any marijuana-related conviction.

The principal rule of statutory construction is that "[w]hen statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it." (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) However, it is well established that the "plain meaning of a statute has been disregarded when the plain meaning 'would have inevitably resulted in "absurd consequences" or frustrated the "manifest purposes" of the legislation as a whole.' [Citation.] This same proposition has been articulated in several ways. 'The apparent purpose of a statute will not be sacrificed to a literal construction.' [Citation.] ' "When aid to construction of the words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " ' " (*Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1003; *State of California ex rel. Dockstader v. Hamby* (2008) 162 Cal.App.4th 480, 487, fn. 2 ["[i]nterpreting statutes literally, without regard to statutory context, may undermine or frustrate legislative intent"].) Further, " '[w]here more than one statutory construction is arguably possible, our "policy has long

been to favor the construction that leads to the more reasonable result. [Citation.]" [Citation.] This policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose.' " (*Catholic Mut. Relief Soc. v. Superior Court* (2007) 42 Cal.4th 358, 371.)

The California Supreme Court has explained that the legislative purpose of the marijuana reform legislation "is to *minimize or eliminate the lingering social stigma* flowing from what is now perceived to be a relatively minor form of criminal activity. [Citation.] The intent is to insure that once the offender has paid his prescribed debt to society, he *not be further penalized by curtailment of his opportunities* for rehabilitation, education, *employment*, licensing, and business or professional advancement." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113, italics added.)

In *Starbucks, supra*, 168 Cal.App.4th 1436, which was published after the regular briefing schedule here,[4] the representative plaintiffs and an estimated class of 135,000 Starbucks job applicants who sought jobs throughout California, claimed entitlement to $200 each, as well as costs and attorney fees, simply because they filled out job applications that violated section 432.8. The plaintiffs conceded they had no marijuana-related convictions and no harm resulted from the job applications. (*Starbucks*, *supra*, 168 Cal.App.4th at pp. 1442, 1447-1448.)

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4 We asked the parties to submit supplemental letter briefs as to the effect, if any, of *Starbucks* on the appeals here. The parties complied, and we have considered their responses.

After analyzing sections 432.7 and 432.8, the court held: "Only an individual with a marijuana-related conviction falls within the class of people the Legislature sought to protect. We see nothing in the statute to support plaintiffs' claim that the Legislature intended to protect the privacy interests of job applications who had no marijuana convictions in their background. . . . [W]e decline to adopt an interpretation that would turn the statute into a veritable financial bonanza for litigants like plaintiffs who had no fear of stigmatizing marijuana convictions." (*Starbucks, supra,* 168 Cal.App.4th at p. 1449.) The court explained that "[w]here civil liability is predicated upon a legislative provision . . . , plaintiffs must establish that they fall within the class of persons for whose protection the legislative provision was enacted. 'The statute must be designed to protect against the *kind of harm* which occurred.' " (*Id.* at p. 1448.)

The *Starbucks* court discussed numerous instances in which courts declined to interpret certain words in statutes literally, when it was antithetical to legislative intent and would lead to absurd results, such as statutory penalties wholly disproportionate to any harm and unrelated to the discernible goal. (*Starbucks, supra,* 168 Cal.App.4th at pp. 1450-1451; *Hale v. Morgan* (1978) 22 Cal.3d 388, 402-405; *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 695-697; *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1005; *Ventura County Ry. Co. v. Hadley Auto Transport* (1995) 38 Cal.App.4th 878, 881; *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1189.) We add that in *State of California ex rel. Dockstader v. Hamby, supra,* 162 Cal.App.4th 480, the court declined to interpret the term "any natural person" as used Government Code section 12650, subdivision (b)(5), a

provision of California's False Claims Act (CFCA), to include employees of a public school district, and thus qui tam plaintiffs may not sue them for statutory treble damages and civil penalties for violating the CFCA in the course of their job duties. (*Id.* at pp. 487-491.) The court noted that even though the term "any natural person" is unambiguous on its face, it is ambiguous when considered in the context of the purpose of the CFCA and the Supreme Court's holding that the measure must be interpreted to exclude public entities as defendants to protect the public fisc. (*Id.* at p. 488.)

In *Starbucks,* the court found section 432.7, subdivision (c) ambiguous, particularly in the context of legislative intent, and it narrowly construed the term "the applicant" to include only persons who have marijuana-related convictions "in accordance with the traditional principle that the applicant be a person who has been *aggrieved* by the statutory violation." (*Starbucks, supra,* 168 Cal.App.4th at p. 1451.) The court noted that section 432.7, subdivision (c) "does not expressly provide that *any* applicant may recover a minimum of $200 as a statutory penalty for an employer asking a prohibited question on a job application, regardless of any nexus to a marijuana conviction lurking somewhere in his or her past. Had the Legislature intended to bestow a cause of action for an automatic recovery of $200 upon "any" applicant, it easily could have done so. Instead, the statute ambiguously provides that, for violations of section 432.8, 'the applicant may bring an action to recover from that person actual damages *or* two hundred dollars ($200) . . . .' " (*Starbucks, supra,* 168 Cal.App.4th at p. 1448.)

The court explained that "[a]ny other construction would produce the absurd result of turning the statute into a veritable 'adding machine' that has been decried by our

Supreme Court. [Citation.] If the legislatures who enacted the marijuana reform legislation in the mid-1970's intended to confer a right to automatic damages on *all* job applicants, regardless of actual injury, we doubt they would have been so opaque in their draftsmanship. ' "The Legislature 'does not, one might say, hide elephants in mouseholes.' " ' " (*Starbucks, supra,* 168 Cal.App.4th at p. 1451.) The court also explained: "We recently disapproved 'the use of the very process of litigation to precipitate payoffs by private businesses for alleged violations of law having no real relationship to a true public interest.' [Citation.] There are better ways to filter out impermissible questions on job applications than allowing 'lawyer bounty hunter[]' lawsuits brought on behalf of tens of thousands of unaffected job applicants." (*Id.* at pp. 1451-1452, quoting *Consumer Defense Group v. Rental Housing Industry Members, supra,* 137 Cal.App.4th at pp. 1216, fn. 22, 1206.)

We agree wholeheartedly with the *Starbucks* analysis. An applicant who has no marijuana-related conviction is not saddled with any social stigma, and is not subject to any job discrimination based thereon. In other words, such a person is in no need of the marijuana reform legislation. Indeed, an applicant free of a marijuana conviction should not suffer so much as sweaty palms or a momentary spike in blood pressure when confronted with a question that violates section 432.8. Interpreting the law to allow an action by persons unaffected by a violation of section 432.8 would burden the courts by encouraging litigation without any appreciable public benefit, threaten California businesses with potentially huge judgments (or settlements in fear of judgments) that are wholly disproportionate to a technical and unintentional offense, and enrich plaintiffs'

attorneys as a goal unto itself. Surely this is not what the Legislature had in mind when it enacted section 432.8.

Accordingly, we reverse the summary judgment for Larson and the class, and reverse the denial of Casual Male's summary judgment motion. On remand, the court is to grant Casual Male's motion and enter summary judgment for it.[5]

III

Larson's Appeal

Larson contends the trial court erred as a matter of law by not awarding each class member a statutory penalty of $500 for an intentional violation of section 432.8, and instead awarding only the minimum penalty of $200 for an unintentional violation of the statute. This argument, however, fails in light of our above holding.

As to the attorney fees order, Larson asserts the court abused its discretion by ignoring the number of hours her counsel worked, arbitrarily reducing some hours, and refusing to apply any multiplier to the lodestar amount. As Larson and the class are no longer prevailing parties, however, they are not entitled to attorney fees under sections 432.7, subdivision (c) and 432.8. When the right to statutory attorney fees is based on

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5 Contrary to Larson, *Faria v. San Jacinto Unified School Dist.* (1996) 50 Cal.App.4th 1939, does not support her position. In *Faria,* the court merely held that an existing employee may not recover statutory remedies under section 432.7, subdivision (c) because it applies only to job applicants, but an aggrieved employee may bring an action for actual damages. (*Faria,* at pp. 1943-1948.) The plaintiff there was demoted after he was arrested for an alcohol offense, for which he was not convicted. He alleged the school district violated section 432.7, subdivision (a) by using information on the arrest against him. (*Faria,* at p. 1942.) The case neither pertains to section 432.8 nor suggests that an applicant not aggrieved by a violation of the law has a remedy under section 432.7, subdivision (c).

success at trial, reversal of a judgment on appeal also extinguishes an attorney fees award. (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.)

DISPOSITION

The judgment for Larson and the class is reversed. Additionally, the court's denial of Casual Male's summary judgment motion is reversed and the matter is remanded to the trial court for its issuance of a new order granting the motion, and its entry of summary judgment for Casual Male. The postjudgment order on attorney fees is reversed. Casual Male is awarded costs on appeal.

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McCONNELL, P. J.

I CONCUR:

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HUFFMAN, J.

AARON, J., concurring and dissenting:

I

INTRODUCTION

"The prerequisites for standing to assert statutorily-based causes of action are to be determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute." (*Surrey v. TrueBeginnings* (2008) 168 Cal.App.4th 414, 417-418 (*Surrey*), citing *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385-1386 (*Midpeninsula*).) "Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." (*Midpeninsula, supra,* 221 Cal.App.3d at pp. 1385-1386.)

The statutory provisions pertaining to standing in this case are, in my view, clear and unambiguous. Labor Code[1] section 432.8 prohibits employers from asking job applicants to disclose any information concerning misdemeanor marijuana convictions that are more than two years old. Section 432.7, subdivision (c) provides that in any case where a potential employer violates section 432.8, "*the applicant* may bring an action to recover from that person actual damages or two hundred dollars ($200), whichever is greater, plus costs and reasonable attorney's fees." (Italics added.) Section 430 defines "applicant" broadly as "an applicant for employment."

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1 All statutory references are to the Labor Code unless otherwise specified.

Rather than read into the statute language that the Legislature did not enact, i.e., that "the applicant" means "a person who has been *aggrieved* by the statutory violation" (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1451 (*Starbucks*), and conclude on this basis, as the majority does, that Larson does not have standing to challenge Casual Male's inclusion of the statutorily prohibited questions in its employment application (maj. opn. at p. 12), I would hold that Larson *does* have standing under the clear language of the statute, but would reverse the class certification on the ground that under the circumstances of this case, it was an abuse of discretion for the trial court to conclude that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

II

LARSON HAS STANDING TO BRING THIS LAWSUIT

A. *Section 432.7 unambiguously grants standing to any applicant for employment*

Relying on *Starbucks*, the majority holds that Larson lacks standing to bring this action or to recover under the statute because she has never suffered a marijuana related conviction, and thus does not belong to the class of individuals that the Legislature intended to protect through its reform legislation. (Maj. opn. at pp. 11-13, citing *Starbucks, supra,* 168 Cal.App.4th at pp. 1447-1451.)

In *Starbucks*, the court concluded that section 432.7, subdivision (c) does not "confer a right to automatic damages upon all job applicants, regardless of actual injury." (*Starbucks, supra,* 168 Cal.App.4th at p. 1451, italics omitted.) With respect to standing, the *Starbucks* court reasoned that "[s]ection 432.7, subdivision (c) does not expressly

provide that *any* applicant may recover a minimum of $200 as a statutory penalty for an employer asking a prohibited question on a job application, regardless of any nexus to a marijuana conviction lurking somewhere in his or her past." (*Starbucks, supra*, 168 Cal.App.4th at p. 1448.) The court continued, "Had the Legislature intended to bestow a cause of action for an automatic recovery of $200 upon 'any' applicant, it easily could have done so. Instead, the statute ambiguously provides that, for violations of section 432.8, 'the applicant may bring an action to recover from that person actual damages *or* two hundred dollars ($200) . . . .' [Citation.]" (*Starbucks, supra,* 168 Cal.App.4th at p. 1448.)

Based on its assertion that the term "applicant" in section 432.7, subdivision (c) is ambiguous, the *Starbucks* court proceeded to "narrowly interpret section 432.7, subdivision (c) in accordance with the traditional principle that the applicant be a person who has been *aggrieved* by the statutory violation." (*Starbucks, supra,* 168 Cal.App.4th at p. 1451.) According to that court, "Only an individual with a marijuana-related conviction falls within the class of people the Legislature sought to protect." (*Id.* at p. 1449.) The majority adopts this analysis. (Maj. opn. at p. 10.)

Contrary to the assertions of the *Starbucks* court and the majority, there is no ambiguity in the statute's use of the phrase "the applicant." Although not cited by either the *Starbucks* court or the majority, section 430, which provides the meaning of "applicant" to be used in section 432.7, specifically defines "applicant" as "an applicant for employment." The statute thus unambiguously provides that "an applicant for employment" — such as Larson — may bring an action to recover from a person who has

violated section 432.8 by asking a prohibited question in an employment application. I simply cannot agree with the *Starbucks* court's "narrow[]" interpretation of the term "the applicant," which the majority endorses, since neither the *Starbucks* court nor the majority acknowledge that the statute expressly defines that very term.

Sections 432.7 and 432.8 do not make any reference to an *aggrieved* applicant. Those sections are not concerned with whether the applicant has suffered any actual damage. Rather, section 432.7, as incorporated by section 432.8, permits any applicant who is asked a prohibited question in an application for employment to seek, at a minimum, the statutory penalty of $200, regardless of the applicant's response to the unlawful question. The legislative scheme thus does not distinguish between applicants who suffered a marijuana related misdemeanor conviction more than two years old and applicants who have never suffered a marijuana related conviction.

There is no reasonable distinction to be drawn between the statutory phrase "the applicant," and the *Starbucks* court's phrase "any applicant." If the Legislature had intended to grant standing only to aggrieved applicants, it would have made that explicit, as it has in other statutes. (See, e.g., the Unruh Act, Civ. Code, § 52, subd. (c), authorizing any person "aggrieved" by the conduct at issue to sue for injunctive or other preventive relief; see also, *Surrey*, *supra*, 168 Cal.App.4th at p. 418 [noting that Civ. Code, § 52, subd. (a) grants standing only to "those persons whose rights under the Unruh Act or the Gender Tax Repeal Act have been 'denied'"].)

B. *The application of the clear meaning of the statutes does not lead to an absurd result*

Both the *Starbucks* court and the majority conclude that section 432.7, subdivision (c), as referenced by section 432.8, is ambiguous with respect to the meaning of the term "the applicant," yet at the same time, conclude by inference that the statute has a discernable plain meaning, but find that meaning to be "absurd." While agreeing with the *Starbucks* court's conclusion that the statute is ambiguous with respect to the meaning of the term "applicant," the majority goes on at some length to justify the need for its construction of the statute, asserting that the plain meaning of the statute would lead to "absurd" consequences. Despite noting at the outset of its discussion that "[t]he principal rule of statutory construction is that '[w]hen statutory language is . . . clear and unambiguous, there is no need for construction, and courts should not indulge it'" (maj. opn. at p. 9, quoting *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198), the majority proceeds to do just that, asserting, "However, it is well established that the 'plain meaning of a statute has been disregarded when the plain meaning "would have inevitably resulted in 'absurd consequences' or frustrated the 'manifest purposes' of the legislation as a whole." [Citation].'" (Maj. opn. at p. 9, quoting *Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1003.)

It is clear from the *Starbucks* opinion that underlying that decision is the court's strong conviction that it would have been grossly unjust to allow every applicant for employment at a Starbucks in California during the relevant time period to recover in the plaintiffs' class action in that case. Starbucks faced penalties of up to $26 million if every

member of the class were to recover the $200 statutory penalty. (*Starbucks, supra*, 168 Cal.App.4th at p. 1440.) Finding that such a penalty would be "the absurd result of turning the statute into [a] veritable 'adding machine,'" the *Starbucks* court chose to construe the statute narrowly to avoid this result, denying recovery to applicants who, as that court stated, were not "*aggrieved* by the statutory violation," on the basis that such applicants had no interest in keeping the existence of a marijuana related conviction private since they had suffered no such conviction. (*Id*. at pp. 1449, 1451.)

Like the majority, I agree wholeheartedly with the *Starbucks* court's sentiment that "'[t]here are better ways to filter out impermissible questions on job applications than allowing "lawyer bounty hunter[]" lawsuits brought on behalf of tens of thousands of unaffected job applicants.' [Citation.]" (Maj. opn. at p. 13, quoting *Starbucks, supra*, 168 Cal.App.4th at pp. 1451-1452.) However, these "better ways" do not include allowing courts to redraft unambiguous statutes to create what the courts believe would be better ones. "We cannot 'ignore the language employed by the Legislature merely because of a subjective evaluation that a differently worded statute would more effectively achieve the statutory goal.' [Citation.]" (*Faria v. San Jacinto Unified School District* (1996) 50 Cal.App.4th 1939, 1945, fn. 2 (*Faria*).) "If the Legislature meant to say something other than what it said, then it, not [the] court, should change the statute. The judicial function is to interpret the language of a statute, not to rewrite it." (*Id*. at p. 1947, fn. 4.) Yet, this is precisely what the majority — and the *Starbucks* court — have done.

"The plain meaning of the words of a statute may be disregarded only when the application of their literal meaning would inevitably (1) produce absurd consequences

which the Legislature clearly did not intend or (2) frustrate the manifest purposes which appear from the provisions of the legislation when considered as a whole in light of its legislative history. [Citations.]" (*Faria, supra*, 50 Cal.App.4th at p. 1945, fn. omitted.) The rationale underlying the majority's and the *Starbucks* court's interpretation of the statute to grant standing only to aggrieved applicants appears to be that interpreting the statute literally would lead to what they consider to be an "absurd result." (Maj. opn. at pp. 11-12.) However, interpreting the statute to accord standing only to those persons whose privacy the statutory scheme was intended to protect would effectively force those persons to expose their private records of conviction in order to vindicate their rights under the statute, since no one else would be authorized to sue to enforce the statute.[2]

The purpose of the statutory scheme is, as the majority states, to "minimize or eliminate the lingering social stigma flowing from what is now perceived to be a relatively minor form of criminal activity," and to ensure that once persons who have suffered misdemeanor marijuana convictions have paid their debt to society, they not be further penalized by curtailment of [various] opportunities, including employment, as a result of those convictions. (Maj. opn. at p. 10, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.) The specific purpose of section 432.8 is to prevent employers from asking the prohibited questions of applicants for employment. The

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2 In addition, the majority's construction of the statute raises a number of questions. For example, since the statutes do not, on their face, require that a plaintiff be an "aggrieved" applicant, must the plaintiff have responded in the affirmative to the offending questions on the employment application, thereby revealing the fact of his or her conviction to the potential employer, in order to have standing? If not, at what point in the process is the court to determine whether the plaintiff has been "aggrieved?"

Legislature could reasonably have determined that the best way to achieve the broad statutory goals was to prohibit employers from including certain questions on their employment applications, and to grant standing to any applicant for employment who is asked a prohibited question, not only to "aggrieved" applicants, so as not to require a person to reveal the protected information in response to an employer's unlawful question.[3] Further, permitting any applicant who is asked a prohibited question to recover $200 is related to the discernable goals of the statute, since the increased likelihood of having to pay a statutory penalty and any attendant attorney fees creates a greater incentive for an employer to change its employment applications to comport with the law.

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[3] Some statutes confer standing on persons who have not been personally aggrieved, in order to achieve a public purpose. In *Midpeninsula*, the court noted that the federal Fair Housing Act does not incorporate "traditional 'prudential' considerations regarding standing — for instance, that a litigant must assert an injury peculiar to himself or to a distinct group of which he is a part . . . ." (*Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1386, citing *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 372-374 [interpreting Fair Housing Act as granting standing to "testers," i.e., persons who had no intention of renting or purchasing a home or apartment, but who posed as purchasers or renters for the purpose of collecting evidence of unlawful practices].) In *Havens*, the Supreme Court observed that in some situations, "'statutes creat[e] legal rights, the invasion of which creates standing . . . ." [Citations.]'" (*Id*. at p. 373.) Here, the Legislature clearly could have decided to grant standing to any applicant for employment ─including applicants not aggrieved in the traditional sense ─ to achieve the public purpose of ensuring that employment opportunities for persons who have suffered a misdemeanor marijuana conviction not be curtailed as a result of those convictions. Granting standing to all applicants who are asked the prohibited question achieves the statutory goal while still protecting the privacy of those who have suffered such convictions.

III

THE CLASS ACTION IS NOT SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY IN THIS CASE

Rather than label as ambiguous what is on its face a straightforward statute and proceed to engage in unwarranted statutory construction, I would hold that under the circumstances presented in this case, it was an abuse of discretion for the trial court to find a class action to be superior to other available methods for the fair and efficient adjudication of this controversy, and would reverse the trial court's certification of the class on this basis.[4]

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside*).) "[B]ecause group action . . . has the potential to create injustice, trial courts are required to "'carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.'" [Citations.]" (*Linder v. Thrifty Oil, supra*, 23 Cal.4th at p. 435.)

The trial court in this case did not specifically address Casual Male's contention in its opposition to plaintiffs' motion for class certification that allowing class certification

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4 A trial court's ruling certifying a class is reviewed for an abuse of discretion. (*Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435.) "[A]n order based upon improper criteria or incorrect assumptions calls for reversal "'even though there may be substantial evidence to support the court's order.'" [Citations.]" (*Id*. at p. 436.)

in this case would effectively impose an excessive cumulative penalty on Casual Male out of proportion to the actual harm caused by Casual Male's conduct. This court therefore cannot be assured that the trial court gave adequate consideration to the due process concerns that are implicated by certification of a class in this case. Of particular significance for purposes of considering whether class treatment is appropriate here is the fact that, as the majority points out, there has been no showing that Larson or any other member of the class has been "aggrieved" in any classic sense as a result of Casual Male's conduct.

Larson essentially concedes the absence of any harm to class members, beyond being asked the prohibited question, but maintains that members of the class "need not show they have been damaged at all to prevail under sections 432.7 and 432.8." While, in my view, for the reasons discussed above, this argument is correct in the sense that an individual plaintiff may recover under the statute without having to establish that he or she suffered any harm beyond having been subjected to an illegal inquiry, in determining whether a class action is superior to other methods of adjudicating alleged violations of section 432.8, the lack of any harm, in the classic sense, to the members of the class ─ particularly when viewed in relation to the burden of imposing significant cumulative penalties on the defendant ─ leads me to conclude that a class action will not afford substantial benefits to the litigants and the courts, and that it therefore is not superior to individual actions. Courts should not facilitate "group action" in cases such as this one, where one cannot say that an injustice has been perpetrated on each individual member of the class and that the circumstances cry out for a remedy for each class member. The

harm that the Legislature sought to prevent by enacting the statutes at issue, i.e., the asking of a prohibited question in an employment applications, can be sufficiently ameliorated by way of imposing the statutory penalty, as well as declaratory and injunctive relief, in a single individual action; a class action is thus not necessary to protect the public's interest.

The class action procedure also should not be used to impose excessive penalties on a defendant that bear little relationship to the harm sought to be redressed. When the Legislature enacted this reform legislation and provided for a statutory penalty of at least $200 for a violation of section 432.8, it is unlikely that the Legislature contemplated that employers might face the kind of significant penalties that would be likely to result from using class actions to address unintentional violations of section 432.8. Taking the statute at face value, the Legislature undoubtedly provided for this minimum statutory penalty, as well as for an award of reasonable attorney fees, to create a sufficient incentive for an individual plaintiff to bring an action for a violation of the statute. However, in the class action context, section 432.7's penalty provision could theoretically allow for recovery by an unlimited number of plaintiffs, and the potential recovery of grossly excessive and ever accruing penalty awards, as evidenced by the multi-million dollar penalty sought by the plaintiffs in *Starbucks*, *supra*, 168 Cal.App.4th at page 1440. In my view, such potentially unlimited recovery simply does not comport with due process where, as here, the violation is technical in nature and the violators are subject to what is essentially strict liability, irrespective of the violator's intent or actual harm to the plaintiffs.

Plaintiffs have identified no member of the defined class who had a marijuana related misdemeanor conviction that was more than two years old and whose privacy was invaded by the request in Casual Male's employment application for information regarding misdemeanor convictions. Under these circumstances, it is difficult to conclude that any harm of the type the statutory scheme seeks to avoid resulted from the inclusion of the improper questions in Casual Male's employment application. "Although certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended [*sic*] upon such an impact. [Citations.]" (*In re Trans Union Corp. Privacy Litigation* (N.D. Ill. 2002) 211 F.R.D. 328, 351.)[5]

In addressing the imposition of cumulative $100 statutory penalties under the federal Truth in Lending Act, the court in *Shields v. First National Bank* (D.Ariz. 1972) 56 F.R.D. 442, 446-447 stated:

> "Upon the undisputed facts of this case it seems fair to conclude that the members of the proposed class suffered no damage at all or that, at most, some amount representing a small fraction of $100. [Citation.] Likewise, the defendant has gained little if anything from the violations alleged by plaintiff. That is not to say the Act should not be enforced but only that the superiority of a class action under these circumstances is inappropriate where the plaintiff can show no damage and the defendant's gain is questionable. [Fn. Omitted.]

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5 "'California courts may look to federal authority for guidance on matters involving class action procedures.' [Citations.]" (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4.)

> [Citation.] The recent cases which held a class action to be inferior to other methods reason that the 'broad and open-ended terms' of Rule 23 'call for the exercise of some considerable discretion of a pragmatic nature' and emphasize that the allowance of a class action in such cases is essentially inconsistent with the specific remedy supplied by the Act. [Citations.]"

The circumstances in this case bear a striking resemblance to those the *Shields* court faced. A class action cannot be deemed "superior" to other means of adjudicating the present controversy where the damages that would be imposed on Casual Male would be entirely out of proportion to any actual harm suffered by the plaintiff or members of the plaintiff class.

Taking into consideration the specific circumstances of this case, including the absence of any evidence of an intentional violation of the statute,[6] as well as the absence of any evidence that Casual Male benefited in any measurable way from including the offending questions in its employment application, the use of the class action procedure in this case would result in unfair and excessive penalties that do not, in my view, comport with principles of due process. Under the circumstances of this case, a class action is therefore not superior to other available methods for adjudication of the issues.

Holding that class certification under these circumstances constitutes an abuse of discretion would be a "better way[ ] to filter out impermissible questions on job applications than allowing 'lawyer bounty hunter' lawsuits brought on behalf of tens of thousands of unaffected job applicants [citation]" (*Starbucks*, *supra*, 168 Cal.App.4th at

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6 I would affirm the trial court's finding that Casual Male did not intentionally violate the statute.

pp. 1451-1452), and would certainly be better than the *Starbucks* court's and the majority's approach of finding a statutory ambiguity where none exists, and essentially rewriting the statute.

For these reasons, I would reverse the trial court's certification of the defined class and reverse the judgment insofar as it grants relief to the class. However, I would affirm the judgment to the extent that it grants Larson individual relief on her cause of action for a violation of section 432.8.[7]

AARON, J.

[7] I recognize that under the resolution of the case that I propose, *any* applicant for employment could sue individually, and thus, that the offending employer's exposure could theoretically be the same, or greater, than in a class action. Realistically, however, the scenario of hundreds or even thousands of individuals bringing their own lawsuits is extremely unlikely. The fact that a court *could* certify a class based on the existence of a numerous, ascertainable class and a community of interest, does not mean that a court *must* or even *should* do so where, as here, the potential damages in a class action would be grossly out of proportion to any actual harm caused by the employer's offending act. (See e.g., *Shields v. First National Bank, supra,* 56 F.R.D. at p. 447 [whether to certify a class "'call[s] for the exercise of some considerable discretion of a pragmatic nature.'")